Supreme Court, U.S.
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BEFORE THE
SUPREME COURT OF THE UNITED STATES

RAMACHANDRAN SEETHARAMAN,	)	
	)	
Petitioner,	)	
	)	No.
v.	)	
	)	
COMMONWEALTH EDISON COMPANY,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHAT IS THE PROPER BURDEN OF PROOF TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII ON SUMMARY JUDGMENT?

II. WHETHER THE PETITIONER ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION UNDER TITLE VII?

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The Caption of the case in this court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1996

RAMACHANDRAN SEETHARAMAN,	)	
	)	
Petitioner,	)	
	)	No.
v.	)	
	)	
COMMONWEALTH EDISON COMPANY,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAMACHANDRAN SEETHARAMAN, the Petitioner herein, respectfully prays that a Writ of Certiorari be granted to review the Judgment of the United States Court of Appeals for the SeventhCircuit, entered in the above entitled case on March 5, 1996.

OPINIONS BELOW

The March 5, 1996 opinion of the Court of Appeals, whose Judgment is herein sought to bereviewed, is unreported. A copy is contained in the Appendix to this petition, A-1. The prior opinion of the United States District Court for the Northern District of Illinois, entered on July 27, 1995, is published at Seetharaman v. ComEd, 1995 U.S. Dist. 10735. A copy of which is contained in the appendix to this petition, A-2.

STATEMENT OF JURISDICTION

The Judgment of the court of appeals was entered on March 5, 1996. The Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Plaintiff filed a complaint against Defendants alleging discrimination on the bases of national origin, religion, color and reprisal pursuant to 42 U.S.C. ß2000e-2 and 42 U.S.C. ß 2000e-3. Plaintiff alleged that Defendants discriminated against him when it denied him promotions, refused to train him, and discharged him.

The Defendant filed a motion for summary judgment. While the parties waited for the court torule on the Defendant's motion, they jointly prepared and filed a pretrial order. On July 27, 1995, the Court granted the Defendant's motion and entered judgment in favor of the Defendant. A notice of appeal was filed on August 14, 1995.

The Plaintiff, RAMACHANDRAN SEETHARAMAN, is a resident of Ashland, Massachusetts, United States of America. Record on Appeal document 1, paragraph 6. The Plaintiff's national origin is Indian, his religion is Hindu, and his color is dark. R 1, paragraph 6. The Defendant, COMMONWEALTH EDISON COMPANY, an Illinois Corporation, is the Electrical Utility that generates, distributes and sells electrical energy to businesses and residences located in the Northern third of the state of Illinois and is the Plaintiff's former employer. R 20, para 1.

The Plaintiff was employed by the Defendant as a General Engineer from August 7, 1989 until August 27, 1992. R 20, para 3; R 20, para 40. He was licensed by the State of Illinois as a "professional engineer." R27, p.3, para 2. The Plaintiff has a bachelor of technology degree in mechanical engineering from the Indian Institute of Technology located in Madras, India. R 36, Exhibit A, para 4. The Plaintiff has a master of science degree from the University of Illinois at Chicago. R 36, Exhibit A, para 4. During his entire employment, the Plaintiff worked in the safety analysis group of the nuclear fuels services department under the direct supervision of Kenneth Kovar. R 20, paras 3, 5. At the time of the Plaintiff's discharge, the manager of the Nuclear fuels services department was Terrance Reick.

The Plaintiff's principle responsibilities as a general engineer were to perform nuclear fuel pin analysis and core thermal hydraulic analysis using the FREY and VIPRE computer codes. R 25, para 6. The purpose of fuel pin analysis is to observe, analyze, monitor, and sometimes decipher the behavior of the fuel pellets within the individual nuclear fuel pin by several variables, including time, local power, average power, cladding elongation, rod internal pressure and temperature. R 25, para 6. The purpose of core thermal hydraulic analysis is to observe, analyze, monitor, and sometimes decipher the behavior of a fuel pin or group of nuclear fuel pins. R 25, para 6. The VIPRE code uses information generated by the RETRAN code, which generates temperature, pressure, flow, and reactor power data as a function of time. R 27, p.3, para 1.

During his employment, the Plaintiff was denied various promotions. Instead, non-Indians, non-Hindus and light colored employees were given the promotions. In early 1990, a position as regulatory assurance supervisor became available. R 25, Exhibit B, Para 6(1). Daryl Taylor (non-Indian, non-Hindu, light), received the promotion. R 25, Exhibit B, para 6(1).

In early 1990, a supervisory engineer position became available when Bruce Momsen left NFS. R 25, Exhibit B, para 6(12). This position was filled by Hak Soo Kim (non-Indian, non-Hindu, light). R 25, Exhibit B, para 6(12).

In early to mid 1990, a lead engineer position became available. R 25, Exhibit B, para 6(11). The Defendant hired Ming Y. Hsiao (non-Indian, non-Hindu, light) for the position. R 25, Exhibit B, para 6(11).

In Mid 1990, the Plaintiff asked for a promotion from Grade 5 to Grade 7 as Oscar Shirani (non-Indian, Non-Hindu, light) had received. R 25, Exhibit B, para 6(2). His request was denied. R 25, Exhibit B, para 6(2).

In early 1991, a principle engineer position became available when Karen Lundell left Nuclear Fuel Services. R 25, Exhibit B, para 6(3). It is unknown who received the promotion. R 25, Exhibit B, para 6(3).

In early to mid 1991, a lead engineer position in the safety analysis group became available. R 25, Exhibit B, para 6(10). This position was filled by Jerry Ballard. R 25, Exhibit B, para 6(10).

In Mid 1991, a principal engineer position became available. R 25, Exhibit B, para 6(6). This position was filled by Ray Magrow (non-Indian, non-Hindu, light). R 25, Exhibit B, para 6(6).

In late 1991, a principal engineer position in the Safety Analysis group became available. R 25, Exhibit B, para 6(4). Lydia Dworakowski (non-Indian, non-Hindu, light) was hired to the position. R 25, Exhibit B, para 6(4).

In late 1991, another principal engineer position became available. R 25, Exhibit B, para 6(5). This position was filled by Pete Esser (non-Indian, Non-Hindu, light). R 25, Exhibit B, para 6(5).

In late 1991 or early 1992, senior engineer position became available when Brad Adams left Nuclear Fuel Services department. R 25, Exhibit B, para 6(8). It is not known who filled his position.

In late 1991 or early 1992, a senior Engineer position became available in the E & C department. This position was filled by Brad Adams (non-Indian, non-Hindu, light). R 25, Exhibit B, para 6(9).

In early 1992, a principal engineer position became available when Pete Esser left NFS. R 25, Exhibit B, para 6(7). This position was filled by John Stanton (non-Indian, non-Hindu, light). R 25, Exhibit B, para 6(7).

During his employment, the Plaintiff made repeated requests for training on the RETRAN code, but each request was denied and he never received RETRAN training. R27, p.3, para 1. Every other employee in the Safety analysis group except the Plaintiff received this training. R 25, Exhibit B, para 5(1)(d). The Plaintiff also requested and was denied the following training:

a. Westinghouse Electric Company Thermal Hydraulic and Transient Analysis Training,

Pittsburgh, Pennsylvania in Mid 1990. Attended by Tim
O'Connor, Jerry Ballard, Darryl Taylor, Ken Kovar, and John Freeman. All were non-Indian, non-Hindu, and light.

b. Nuclear Design Training of Westinghouse in late 1989, mid 1990, and mid 1991.
Attended by Tim O'Connor, Jerry Ballard, Darryl Taylor, Ken Kovar, and John Freeman. All were non-Indian, non-Hindu, and light.

c. PWR Systems Class in late 1989, mid 1990, and mid 1991. Attended by several white males in the engineer ing and construction department,
Ken Kovar, E.H. Young. All were non-Indian, non-Hindu, and light.

d. BWR Systems Class in late 1989, mid 1990, and mid 1991. Attended by Several white males in the engineer ing and construction department, Ken Kovar, and E.H. Young. All were non-Indian, non-Hindu, and light.

R 25, Exhibit B, para 5(2) - (5).

During the Plaintiff's Employment, the safety analysis group contained approximately 16 employees and the entire Nuclear Fuel services Department contained approximately 80 employees. R
20, para 4. The Plaintiff was the only individual within the Safety analysis group who was Indian and Hindu. R 20, para 42. One other engineer, Ahmed Salaudin had dark skin. R 20, para 42.

In late July 1992, Terrance Reick, held a series of meetings with the five supervisors within the nuclear fuel services department: (1) Ken Kovar, (2) Hak Soo Kim, (3) Ron Chin, (4) Jack Dolter, and (5) Everett Young. R 20, para 32. On August 27, 1992, the Plaintiff was discharged from his position allegedly because he was the poorest performer in the department and a function closely associated with his job was to be eliminated. R 20, para 38. The decision to terminate the Plaintiff was made by Terrance Reick after consultation with Ken Kovar, Haksoo

Kim and the others. R 20, para 32, 38. Prior to being discharged, Terry Reick told the Plaintiff that performance evaluations were not going tobe used to determine who would be laid off. R 27, p.4, para
7. Terry Reick denies making thisstatement to the Plaintiff. R 26, Exhibit E, para 1.

During his employment, the Plaintiff was subjected to various derogatory statements about his national origin and religion by Ken Kovar and Hak Soo Kim. Ken Kovar told the Plaintiff in 1990, "with your Indian background and Hindu ways," you won't get far in this company. R27, p.3, Para 4. Also, after a training session, Kovar told the Plaintiff "no more of your Indian ways of asking questions." R27, p.3, Para 4.

In 1990, the Plaintiff asked Hak Soo Kim for some information relating to some work the Plaintiff had to do. Hak Soo Kim yelled at the Plaintiff and called him "you worthless Indian crap." R27, p.4, Para 5. Kim had earlier told the Plaintiff: "In a Caucasian culture people talk behind your back and most people here are from a Caucasian culture. You with your Indian and Hindu background won't get along around here." R27, p.4, Para 5. Kim also told the Plaintiff that he believed that "Indians are low quality and they produce low quality work." R27, p.4, Para 5. Kovar and Kim deny making these statements. R 26, Exhibit C; R 26, Exhibit D.

In 1992, in a training session, an instructor told an off color racist joke to which the Plaintiff took offense. R 27, p.4, Para 6. The Plaintiff reported it to Kovar and was orally reprimanded by Kovar for allegedly asking the wrong type of questions in the training class. R27, p.4, Para 6.

During the Plaintiff's employment, he received three overall performance evaluations. The ratings for performance were "exceptional performance," "Fully meets expectations," "Needs improvement to meet expectations," and "Unacceptable." R 20, para 9.

For 1989, the Plaintiff received an overall performance rating of fully meets expectations. R 20, para 10. For 1990, the Plaintiff again received an overall performance rating of "Fully meets

expectations." R 20, para 16. For 1991, the Plaintiff received an overall performance evaluation of "Needs improvement to meet expectations." R 20, para 22.

In 1992, the Defendant changed the rating criteria. R 21, Exhibit F, RAM 75. It established one section of "meets expectations" and one section of "does not meet expectations." R 21, Exhibit F, RAM 75. On May 7, 1992, the Plaintiff received four evaluations on work that he had completed or was doing. Each of these evaluations were within the "Meets Expectations" rating section. R 21, Exhibit F, RAM 69-70. The Plaintiff did not receive an overall evaluation for 1992. R 21, Exhibit F, RAM 67.

Although the Plaintiff never received an overall assessment of "unacceptable performance," he chose to address some of the comments made by his supervisor in his 1990 and 1991 performance reviews. In his rebuttal to his 1990 performance evaluation, he stated that he had been subjected to discrimination in his hiring. R 21, Exhibit F, RAM 55. In his rebuttal to his 1991 performance evaluation, he reported that he was being subjected to an intimidating work environment. R 21, Exhibit F, RAM 0064-0065. These rebuttals were attached to his performance ratings. R 21, Exhibit F, RAM 48-66. Terrance Reick reviewed these performance evaluations with the statements opposing discrimination prior to discharging the Plaintiff. R 21, exhibit A, para 9.

No other individual was discharged from the Nuclear Fuel Services department pursuant to the reduction in force. The following non-Indian, non-Hindu, light skinned employees with less experience and less seniority than the Plaintiff were retained: Rich Park, Patrick Murphy, Craig Holmes, Carol Tracy, Rebecca Shoemaker, Greg S. Croon, Brian Jelke, Chris Kovach, Timothy Feren, Roger Hamilton, and Ming Y. Hsiao. R 25, Exhibit B, para 7. In addition to these individuals, Salaudin Ahmed also did not complain about discrimination. R 25, Exhibit B, para 7(d).

Craig Holmes was hired as an engineer into the safety analysis group on June 29, 1992. R 25, Exhibit C. Holmes was

not laid off during the reduction in force. R 25, Exhibit B, para 7; R 36, Exhibit A, para 26. The Plaintiff's job responsibilities were assumed by the remaining employees in the safety analysis group. R 20, Para 41. The employees who were able to assume the Plaintiff's duties were Brian Jelke and Tim O'Connor. Brian Jelke was qualified to perform Thermal Hydraulics and containment analysis. R 36, Exhibit C, Plaintiff's Exhibit 5. Tim O'Connor was qualified to perform transient analysis, kinetic analysis, thermal hydraulics, and fuel pin analysis. R 36, Exhibit C, Plaintiff's Exhibit 5.

Although the Plaintiff was allegedly discharged for poor performance, the Defendant suggested other areas where the plaintiff's skills could be utilized, including: "ENC Mech/Structural group or a generating station (Nuclear or fossil)." R 21, Exhibit B.

Prior to the Plaintiff's discharge, the Defendant released an internal investigation that revealed that it was more economically feasible for the Defendant to have someone on staff performing the Plaintiff's computer analysis duties rather than having it done by outside vendors. R 25, Exhibit A, p. 5.

The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. ß 1291.

REASONS FOR GRANTING WRIT OF CERTIORARI

This court should grant certiorari because 1) the decision of the court of appeals is in conflict with the decisions of other circuits, and 2) this court should exercise its powers of supervision and reverse the decision of the court of appeals because it had departed so far from the usual and accepted course of judicial proceedings when it affirmed the District Court's decision.

The first part concerns the proper standard for establishing a prima facie case of discrimination, especially when defending against a Summary Judgment motion. There is a split among the various Circuit Courts of Appeal as to what the proper standard and elements are. The Supreme Court has not specifically and clearly addressed this issue in a manner that

would impose uniformity on the Circuit Courts of Appeal when using this standard. In the First Circuit, the Petitioner must establish that he or she was qualified for the position, was terminated, and the position was then offered to similarly qualified employee after Petitioner was terminated. Pogano v. Frank, 983 F.2d 343 (1st Cir. 1993). The Second Circuit, in Song v. Ives, requires that the Petitioner must present evidence to show that he performed his duties satisfactorily, was discharged under circumstances suggesting that discrimination was a factor, and that the Defendant sought to hire other applicants. 957 F.2d 1041 (2nd Cir. 1992).

In Ezold v. Wolf, Block, Schorr and Solis-Cohen, the Third Circuit stated that in a trial setting, the Petitioner must establish that she was qualified for a position, was rejected or terminated from the position, and that an employee outside the Petitioner's minority group was treated better than the Petitioner. 983 F.2d 509, 522(3rd. Cir. 1992). Ezold made it clear, however, that this is an easy standard to meet. Id. at 523. Ezold also explained that disputes over subjective evaluations should only be resolved at the second and third stages of the McDonnel Douglas analysis, not at the prima facie case stage. Id. This is necessary to avoid imposing "too onerous" of a burden on the Petitioner in making out a prima facie case. Id.

In Wileman v. Frank, the Fourth Circuit explained that the Petitioner must prove a prima facie case by eliminating the most common non-discriminatory reason for the Petitioner's rejection. 979 F.2d. 30, 33 (4th Cir. 1992). Another Fourth Circuit case indicated that for a prima facie case, the Petitioner must show that the prohibited conduct engaged in was similar to what other employees did who were not members of the class, and that the discipline imposed against the Petitioner was more severe than what was imposed on the other employees. Cook v. CSX Transportation Company, 988 F.2d 507. 511 (4th Cir.).

The Fifth Circuit noted that a prima facie case of discrimination is met by showing that the Petitioner was qualified, was terminated, and then replaced by another employee who was

not a member of the Petitioner's class. Frazier v. Garrison ISD, 980 F.2d 1514 (5th Cir. 1993). In Galbraith v. Northern Telecom Inc., the Sixth Circuit explained that a prima facie case may be made by proving that an adverse action was taken under circumstances giving rise to an inference of discrimination. 944 F.2d 275 (6th Cir. 1991).

In Sischo-Nownwjad v. Merced Community College, the Ninth Circuit explained that the Petitioner need only show that discrimination played a motivating part in the decision to terminated the Petitioner in a mixed motive case. 934 F.2d 1104, 1110 (9th Cir.). The Ninth Circuit emphasized that the amount of evidence needed for a prima facie case was "very little." Id. at 1110-11. Once a prima facie case is established, Summary Judgment should normally be denied even if the employer articulates a non-discriminatory reason because once a prima facie case is established, the Petitioner will "necessarily" have raised a genuine issue of fact as to the validity of the Defendant's articulated reason. Id. at 1111. The Court explained that it only required a "little" evidence because the ultimate issue "can only be resolved through a searching inquiry." Id.

In Notari v. Denver Water Department, the Tenth Circuit stated that Petitioner could make a prima facie case by producing enough evidence to raise a probability that but for the petitioner classification, the challenged employment decision would have favored the Petitioner. 971 F.2d 1104, 590 (10th Cir. 1991). The Eleventh Circuit, in Weaver v. Gallardo, explained that a prima facie case could be met by establishing that the Petitioner was qualified for a position, was terminated, and that (a) the position was filled by a non-minority employee, (b) that other employees with similar qualifications were retained, or (c) disciplinary rules were not applied equally. 922 F.2d 1515, 1525 (11th Cir. 1991).

In the present case, the Seventh Circuit, simply held: "For the reasons given by the District Court, the Judgment is affirmed." (A-1). The District court explained that a Petitioner establishes a prima facie case by proving that the Petitioner is

a member of a protected class, he was performing his job well enough to meet his employers legitimate expectations, he was terminated, and others not in the protected class were treated more favorably. Seetharaman v. ComEd, 1995 U.S. Dist. LEXIS 10735,19-20.

The Court in Seetharaman did not follow the simple burden of proof standard followed by other Circuits. Rather, the Court applied a rigid analysis to Petitioner's evidence and applied a very strict standard for proving a prima facie case on Summary Judgment.

Petitioner provided evidence that his supervisor, Ken Kovar, and Hak Soo Kim, another member of the committee that chose to discharge him, had made discriminatory remarks against him in the past. Kovar had told him "with your Indian background and Hindu ways, you won't get far in this company." (R 27, p.3, para 4). Kovar also told him "no more of your Indian ways of asking questions." (R 27, P. 4, para 5). Hak Soo Kim had yelled at the Petitioner calling him "you worthless Indian Crap." (R. 27 p. 4, Para 5). He had also told him that "in a Caucasian culture, people talk behind your back and most people here are from a Caucasian culture. You with your Indian and Hindu ways won't get along around here." Kim also told the Petitioner that he believed "Indians are low quality and they produce low quality work. (R 27 p.4, para 5). Mr. Kovar was also the individual who evaluated the Petitioner's performance upon which the Respondent allegedly based its decision to discharge the Petitioner.

The Petitioner also provided evidence that he performed his job well enough to meet the legitimate expectations of the Respondent. Four months before he was discharged, he received evaluations on the four projects on which he was working. Each of these evaluations were within the "Meets Expectations" rating section. R 21, Exhibit F, RAM 69-70. In addition, although the Petitioner was allegedly discharged for poor performance, the Respondent suggested other areas where the Petitioner's skills could be utilized, including: "ENC Mech/Structural group or a generating station

(Nuclear or fossil)." R 21, Exhibit B. Further there was no other evidence that the Petitioner would have even been discharged had there not been a reduction in force.

The District Court, however, found that Petitioner had not satisfied that prong of the prima facie case. The Court of Appeals affirmed for the reasons set forth by the District Court.

When the Petitioner's evidence and arguments are scrutinized under the various standards for establishing a prima facie case among the Circuit Courts of Appeal, it is evident that he easily established a prima facie case under some of these standards. Under some of the more stringent standards, however, it could be said for the sake of argument, that he would have more difficulty in convincing the Court that he had proved a prima facie case. This lack of consistency among the Circuits is untenable and should be reviewed by this court.

This court should also review the decision of the Court of Appeal and the District court pursuant to its supervisory authority because with all of the evidence proffered by the Plaintiff indicating discrimination, the courts still granted summary judgment and deprived the Petitioner of a chance to present his case to a jury of his peers.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that his petition for Writ of Certiorari be granted. In the event that this Writ is granted, Petitioner requests that the Judgment of the Seventh Circuit and the District Court be reversed and remanded for trial and that a new or uniform method for establishing a prima facie case on a Summary Judgment motion be established.

GOLDMAN & EHRLICH, as Attorneys for
RAMACHANDRAN
SEETHARAMAN

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Argued February 28, 1996
March 5 , 19 96, 1996.

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon . MICHAEL S. KANNE, Circuit Judge

RAMACHANDRAN SEETHARAMAN,
Plaintiff-Appellant,

No. 95-2930
COMMONWEALTH EDISON COMPANY
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Dlvlslon.

No. 94 C 4373
George W. Lindberg, Judge.

Order

For the reasons given by the district court, the judgment is

AFFIRMED

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
JUDGMENT - WITH ORAL ARGUMENT

Date: March 5, 1996

BEFORE: **Honorable** JOHN L. COFFEY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 95-2930

RAMACHANDRAN SEETHARAMAN,
Plaintiff - Appellant
v.
COMMONWEALTH EDISON COMPANY, a corporation,
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 94 C 4373, George W. Lindberg, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunnigham — Office of the Clerk
CLERK

Gerald A. Goldman
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Case Number: 1:94-cv-04373

Title: Seetharaman v. Comm Ed

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 7/2-7/95 by Hon. George W. Lindberg : Defendant Commonwealth Edison's motion for summary judgment
[18-1] is granted. Enter memorandum opinion and order. Mailed notice

This docket entry was made by the Clerk on July 28, 1995

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAMACHANDRAN SEETHARAMAN,	)	
Plaintiff,	)	No. 94 C 4373
-v-	)	Judge George W.
	)	Lindberg
COMMONWEALTH EDISON, a corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before the court is defendant Commonwealth Edison Company's motion for summary judgment in this Title VII discrimination claim brought by plaintiff Ramachandran Seetharaman.

I. FACTS

Commonwealth Edison Company ("ComEd") is the electric utility that generates, distributes, and sells electrical energy to businesses and residences in the northern third of the State of Illinois. Plaintiff Ramachandran Seetharaman was born in India, is of the Hindu religion, and has a dark complexion. Kenneth N. Kovar, the supervisor of ComEd's Safety Analysis Group, recommended that ComEd hire Seetharaman, which ComEd did. Seetharaman began his employment with ComEd on August 7, 1989 as a "General Engineered in the Safety Analysis Group. From 1989 to 1992, ComEdts Safety Analysis Group contained approximately 16 employees. During that same time period, ComEdts Nuclear Fuel Services Department, of which the Safety Analysis Group was a part, contained approximately 80 plus employees. At all times during Seetharaman's employment at ComEd, Kovar was his immediate supervisor.

ComEd's Safety Analysis Group performed various safety analyses designed to monitor and test the integrity of ComEd's nuclear reactors. Plaintiff's principal job responsibilities at ComEd were to perform nuclear pin and core thermal-hydraulic analyses using various computer codes.1 A nuclear fuel pin is a rod approximately 12 feet in length which contains the nuclear fuel pellets-. The purpose of nuclear fuel pin analysis is to observe and monitor the behavior of the fuel pellets within the individual nuclear fuel pin by temperature. Core thermal hydraulic analysis involves an examination of nuclear fuel pins by temperature.

To ensure the highest quality performance with regard to this work, ComEd's Safety Analysis Group maintained and implemented a qualifications system relating to each of the

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1 In his Local General Rule 12(n) statement, Seetharaman describes his job responsibilities slightly differently, but because he fails to provide any reference to the record supporting his position, the court treats Comedies description of Seetharaman's duties as admitted. See Flaherty v Gas Research Institute, 31 F3d 451, 453 (7th Cir 1994). This problem is endemic throughout Seetharamants Local Rule 12(n) statement. Thus, at appropriate points in the recitation of the facts, the court will note that Seetharaman either fails to cite to the record, or that his citation is not specific enough, or that his specific cite to the record simply fails to support his denial of the relevant statement in ComEd's Local Rule 12(m) statement.

different analyses performed by the group. In addition, one engineer would perform the analysis in question, and another engineer would review the first engineer's written work products known as a "calcnote. H AS Seetharaman's immediate supervisor, Kovar was responsible for assessing Seetharaman's job performance in accordance with ComEd's Performance Planning and Review ("PPR") system. Prior to 1992, ComEd's PPR ratings contained the following four categories: (1) "EP" meaning Unexceptional Performances; (2) "FME" meaning Awfully Meets Expectations"; (3) "NI" meaning "Needs Improvement to Meet Expectations"; and (4) "UP' meaning

"Unacceptable Performance." For the three months in 1989 during which Seetharaman worked for ComEd, Kovar rated Seetharaman's overall job performance as "FME."

Seetharaman's 1990 Work

During 1990, ComEd assigned Seetharaman to work on three primary projects. One project consisted of conducting nuclear fuel pin analyses of three separate nuclear fuel pins. The second project involved creating a model of a partial nuclear fuel core of ComEd's Braidwood and Byron nuclear generating station reactors. The third project involved conducting a core thermalhydraulic analysis for ComEd's Zion nuclear generating station.

Seetharaman's nuclear fuel pin analyses were unsatisfactory in both quality and quantity .2 Seetharaman completed analyses of only two of the three nuclear fuel pins during 1990. Seetharaman's analyses of the two pins that he did complete were so poor that Hossein Youssefnia, who reviewed Seetharaman's work on the project, had to take the unusual step of conducting a second review of Seetharaman's work. Seetharaman's poor performance not only delayed completion of the project at hands but also reduced the amount of time available to Youssefnia to complete his other assignments.

In 1990, Kovar rated Seetharaman's job performance on the nuclear fuel pin analysis project as "NI." In the six-month review, Kovar warned Seetharaman that his job performance needed improvement in the following areas: (l) "work more independently"; (2) "try to resolve anomalous results through detailed investigation"; (3) "thoroughly document important information"; (4) "Do not work on tangential paths"; and (5) "Use engineering judgment prior to running jobs on the mainframe." Kovar did note that 3"[p]erformance at period end was improving

2 Again, although Seetharaman disputes this assertion, he fails in his Local Rule 12(n) statement to provide any reference to the record. Thus, the court accepts this statement from ComEd's Local Rule 12(m) statement as true for the purposes of this motion. See Flaherty, 31 F3d at 453.

3 This statement is taken from paragraph 13 of ComEd's Local Rule 12(m) statement. In his Local Rule 12(n) statement, Seetharaman disputes the allegations in paragraph 13 of ComEd's Local Rule 12(m) statement, but the part of the record cited by Seetharaman does not contradict ComEdws statements in paragraph 13.

based on additional communication, elimination of misunderstandings, clarification of goals and objectives."

In the annual performance assessment for 1990, Kovar rated Seetharaman's performance on the nuclear fuel pin analyses as "NI." As for the delays that plagued the project, Kovar noted: Project was delayed in part due to code updates, and work scope changes which were beyond Ram's control. There were also delays and low productivity due to belated review and poor communication. The communication problems lead [sic] to significant review comments, overdrawn resolution of those comments, uneven documentation and overall inefficiency."

Although Seetharaman did not complete his second main project for 1990 (the modeling of the partial nuclear fuel core of ComEd's Braidwood and Byron generating station reactors), Kovar rated Seetharaman's performance on this project as "FME." The work was delayed due to a computer code update and an additional task given to Seetharaman in May and June of 1990. Because of the delays on the first two projects for 1990, Seetharaman did not work on the project for the Zion generating station during 1990. For the year, Kovar rated Seetharaman's work as "FME."

During 1990, Seetharaman was one of only two members of ComEd's Safety Analysis Group who received an "NI" rating

for any project. No other member of the Safety Analysis Group received a lower overall assessment in 1990 than that given to Seetharaman. At that time, Seetharaman recognized that his 1990 PPR assessment was a marginal FME rating" that 'depicted [him] as a person with a performance problem."

Seetharaman's 1991 Work

During 1991, Seetharaman worked on three primary projects. The first project was a nuclear fuel pin analysis of the third nuclear fuel pin initially assigned to him in l990. The second project involved performing nuclear fuel pin analyses on the three nuclear fuel pins using an updated computer code. The third project consisted of conducting a sensitivity study using the partial nuclear fuel core model of ComEd's Braidwood and Byron nuclear reactors.

With respect to the first project for 1991 (the third nuclear fuel pin analysis initially assigned in l990), Seetharamants performance was rated NI.8t Kovar noted: There were numerous review comments on Ramts . . . calcnote (4/25/91). Ram's resolution of these comments . . . was incomplete. A second round of comments was given to him . . . . Performance needs improvement." 4

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4 Seetharaman disputes the statements in this paragraph, but the part of the record he refers to confirms that for the annual assessment of his work on this projects he received a rating of "NI." Rovarws comments also appear as stated in this paragraph. See Defendant's Appendix F Exh 32.

Seetharaman's performance on the second project assigned to him for 1991 (the nuclear fuel analyses of the three pins using updated computer codes) was sloppy, inaccurate, and required too much of Youssefniats assistance. It took Seetharaman much longer to complete than it should have. As Youssefnia noted in his extensive review comments, Seetharamants work n lack[s] the depth of information and quality of work expected from someone with his exposure on .

. . [the] project. . . . So far his work on [the project] has been low quality, and [has] required a lot of my help.' Consequently, Rovar rated Seetharaman's performance on that project as "NI."5

Similarly, Seetharaman's work on the sensitivity study of the Braidwood and Byron partial nuclear fuel core model was unsatisfactory. Timothy O'Connor, another engineer who reviewed Seetharamants work on this project, noted in his extensive review comments, that Seetharaman's calcnote did not reflect the proper methodology for the analysis, that Seetharaman identified the wrong base case, and that Seetharaman used wrong values for several property table entries and for the sensitivity analysis itself. Consequently, Kovar gave Seetharaman an "NI" rating for this project as well. 6

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5 Seetharaman contests the statements in this paragraph, which are taken from paragraph 20 of ComEdts Local Rule 12(m) statement, yet he fails to cite to that part of the record supporting his position. Moreover, as before, he asserts that he received a rating of "FME* for this project in his six-month review. However, this does not contradict ComEd's assertion (which is supported by the record) that Kovar rated his performance on this project as "NI" in the annual review. See Defendant's Appendix F Exh 34.

In Seetharaman's 1991 PPR assessment form, Kovar rated Seetharaman's overall performance for the year 1991 as "NI." Seetharaman wrote a rebuttal to Kovar's overall assessment in which he essentially challenged the assessment. Seetharaman stated that he believed certain of Kovar's comments were "unnecessary Venial," and Highly incorrect. n Seetharaman's overall performance assessment of "NI" for 1991 was the lowest of all members in the Safety Analysis Group . 7

In order to facilitate the PPR process and to provide regular feedback to the members of the Safety Analysis Group concerning their respective job performance, Kovar held monthly short term objective meetings with each of his subordinates.

After Seetharamants poor review in 1991, Rovar increased the frequency of Seetharaman's short term objective meetings from once to twice a month in an attempt to provide more frequent feedback to Seetharaman about his job performance and to help him succeed as a ComEd employee.

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6 See supra note 2.

7 Seetharaman purports to deny the statements in paragraph 22 of ComEdts Local Rule 12(m) statement, but, in fact, the 1991 PPR assessment of Seetharaman by Kovar (cited by both parties) contains the overall assessment of NIX quoted by ComEd. In addition, Seetharaman purports to deny that he received the lowest overall rating for 1991, but he cites no part of the record to support his position.

Seetharaman's 1992 Work

During 1992, ComEd assigned Seetharaman three separate special objectives. First, he was to complete the remainder of his work on the sensitivity study with respect to the Braidwood and Byron partial nuclear fuel core model. Second, Seetharaman was to create a training procedure for learning the FREY computer code. Third, Seetharaman was to review and summarize the calcnotes involving core thermal-hydraulic analyses produced by the Safety Analysis Group. Seetharaman's work in 1992 on the sensitivity study remained poor in that he did not adequately resolve the extensive review comments of Mr. O'Connor. Seetharaman's work product displayed a lack of understanding of the analysis, and contained numerous fundamental errors in methodology. Consequently, Kovar gave Seetharaman a PPR rating of "S" for the project (which, under the new rating system, he used as equivalent to the former rating of "NI").

Seetharaman's work on the FREY computer code training procedure also was poor in that it required extensive review comments and took far too much time to complete. Kovar returned Seetharaman's memorandum reflecting the changes

in the training procedure as "incomplete and unacceptable.' Kovar rated Seetharaman's performance on this project as "S." 8 Rovar rated Seetharaman's performance with respect to the

8 See supra note 2.

review and summarization of the calcnotes involving core thermal-hydraulic analyses as "ME" meaning "meets all Expectations." However, as of May, 1992, Seetharaman's job performance continued to be considerably worse than that of every other member of the Safety Analysis Group.9

ComEd'S Work Force Reductions

In response to serious financial conditions facing ComEd, in the summer of 1992 ComEd implemented a reduction in its work force to eliminate approximately 1250 management positions. ComEd's Nuciear Fuel Services Department, of which the Safety Analysis Group was a part, was to reduce its management personnel by approximately 10% (8-12 employees). The decisions regarding which individuals ComEd would select for involuntary separation were to be made department by department on the basis of individual work performance and the importance of the job function to ComEd.

In late July and August of 1992, Terrance A. Rieck, who was the Manager of ComEd's Nuclear Fuel Services Department, held a series of meetings with the five supervisors within the Nuclear Fuel Services Department: (1) Ken Kovar; (2) Haksoo Kim; (3) Ron Chin; (4) Jack Dolter; and (5) Everette Young. Rieck informed the supervisors that there would be a reduction in force and that involuntary separations may be necessary within the Department to meet the targeted reduction. Both Ron Chin and Haksoo Rim have national origins other than the United States.

9 See supra note 2.

At the outset, Rieck and the supervisors within ComEd's Nuclear Fuel Services Department discussed and identified functions within each working group in the Department that were low priority and that ComEd could eliminate. The lowest priority function in the Safety Analysis Group was nuclear fuel pin analysis because the computer code utilized for the analysis was developmental and outside vendors could efficiently perform the work.10 Consequently Rieck decided to eliminate that job function. During the summer of 1992, only two members of the Safety Analysis Group were actively working on projects involving nuclear fuel pin analysis: Youssefnia and Seetharaman.

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10 Seetharaman disputes this statement, stating: There were other developmental programs that were not given to outside vendors and nevertheless, it was more efficient to have an employee perform Nuclear fuel pin analysis." Local Rule 12(n) statement s 34. Seetharaman cites generally to Plaintiff's Exhibit 1, a document describing ComEd's Vendor Independence Program. First, it does not appear that the citation to the entire report constitutes the sort of "specific reference" called for by Local General Rule 12(n)(3)(a). Second, aside from that problem, the court found no support for Seetharaman's statement that "there were other developmental programs that were not given to outside vendors." Indeed, the 1990 report could not possibly support such a statement because it predated the 1992 layoffs. Third, as for the statement that a ComEd employee could perform the work more efficiently, Plaintiff~~s Exhibit 1 merely states that, once ComEd developed the in-house capability to perform that function, it would be more efficient. The report explicitly states that "the thermalhydraulic and transient analyses and safety evaluations, continue to be performed by the fuel vendor, while [ComEd] develops, implements, and licenses this capability." Thus, Seetharaman has not effectively disputed the statement in the text concerning why nuclear fuel pin analysis was the lowest priority function in the Safety Analysis Group.

After Rieck and the Nuclear Fuel Services Department had identified job functions to be eliminated, Rieck sought to identify poor performers within the Department. Rieck reviewed the PPR ratings of each of the approximately 80 plus persons within the Department and discussed with the Department supervisors the work performance of their respective subordinates 11

Since 1991, Seetharaman's PPR ratings were the lowest in the Department. Based upon those PPR ratings and other feedback concerning Seetharaman's performance that Rieck acquired by virtue of his duties as Manager of the Nuclear Fuel Services Department, Rieck identified Seetharaman as the poorest performer in the Department.

Because Seetharaman was the poorest performer in the Department and because a function closely associated with his job was to be eliminated, Rieck directed Kovar to prepare a "Separation Justification Format for Seetharaman. Seetharaman's Separation Justification Form notes that he received a PPR assessment of "NI" in 1991, and that his overall work performance had not improved as of August 1992. The Separation Justification Form explains that Seetharaman had "poor interpersonal and communication skills, frequent misunderstandings and strained working relationships with others, Sand] poor productivity due to many reviewer comments on his work."

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11 Seetharaman disputes this statement, but his reference to "Plaintiff's Depositions does not constitute the sort of specific reference to the record required by Local General Rule 12(n)(3)(a) in order to dispute effectively a statement made in the movant's Local Rule 12(m) statement.

Rieck forwarded the Separation Justification Form and all available PPR assessment forms for Seetharaman and all other candidates for separation from the Department to Dennis Farrar, ComEd's General Manager of Nuclear Services, for review by Farrar and by a special review committee of senior

management. Farrar and the special review committee approved Seetharaman's involuntary separation, and Rieck terminated Seetharaman's employment on August 27, 1992. ComEd did not hire anyone to replace Seetharaman. After August 1992, outside vendors assumed Seetharaman's duties involving nuclear fuel pin analysis, and the remaining members of ComEd's Safety Analysis Group assumed his other job duties.

Seetharaman testified in his deposition that one third of the engineers who worked in ComEd's Safety Analysis Group under Rovar immediately prior to Seetharaman's termination on August 27, 1992, have national origins other than the United States: (1) Salauddin Ahmed is from Bangladesh; (2) Lydia S. Dworakowski is from Yugoslavia; (3) Pedro L. Song is Filipino; (4) Robert W. Tsai is Asian; and (5) Hossein M. Youssefnia is from Iran. Both Ahmed and Youssefnia practice the Muslim religion and Ahmed is dark complexioned. ComEd did not involuntarily separate any of the above individuals during the 1992 reduction in force.

Since the termination of his employment with ComEd in August 1992, Seetharaman has obtained a job which currently provides comparable benefits to those he received from ComEd and which pays him over $15,000 per year more in base salary.

Comments Directed Towards Seetharaman

In 1990, Kovar told Seetharaman that "with your Indian background and Hindu ways, you won't get far in this company." Also after a training session, Kovar told him "No more of your Indian ways of asking questions." That same year Seetharaman approached Hak Soo Kim for some information relating to some work he had to do. Hak Soo Kim yelled at Seetharaman and called him "you worthless Indian crap." Kim also said to him: "In a Caucasian culture, people talk behind your back and most people here are from a Caucasian culture. You, with your Indian and Hindu background, won't get along

around here." Kim also told Seetharaman that "Indians are low quality and they produce low quality work.' In 1992, in a training session, an instructor told an off color racist joke to which Seetharaman took offense. He reported it to Kovar and was reprimanded.12

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12 In his Local Rule 12(n) Statement of Facts, Seetharaman failed to provide evidentiary support that any such remarks were made. See ¶¶ 5-7. However, with the court's leave, Seetharaman subsequently filed an affidavit. In the affidavit, he avers that the comments described in the text were made.

EEOC Proceedings

Seetharaman filed a charge of discrimination with the Equal Employment Opportunity Commission on December 24 1992, claiming that he was terminated from ComEd due to-his national origin, religion, color, and based on retaliatory motive. On April 22, 1994, the EEOC issued its determination" concluding that Seetharaman had failed to establish a violation of Title VII and affording Seetharaman of his right to sue. Seetharaman then filed this action against ComEd on July 19, 1994.13

II. ANALYSIS

Upon proper motion, the court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c).

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13 Seetharaman offered his own Statement of Facts as provided by Local General Rule 12(n)(3)(b). Most of the statements are not properly supported by references to the record and thus cannot serve to contradict the properly supported statements in ComEd's Local Rule 12(m) statement. In particular, Seetharaman states that throughout his employment, he performed his duties "satisfactorily

In support, he cites Defendantts Appendix F. Exhibits 32 & 34." Because the pages of these exhibits are not numbered, the court accepts this as a sufficiently specific citation. However, the court's review of exhibits 32 and 34 reveals that these exhibits do not confirm Seetharamants blanket statement. In response to the 1990 PPR, Seetharaman admitted that it was a "Marginal FME rating" and that it depicted him as a person with a performance problem Exhibit 32. For 1991, he received an overall PPR rating of "NI." Exhibit 34. The materials cited by Seetharaman do not support the assertion in his Local Rule 12(n) statement that throughout his employment he performed his duties "satisfactorily" Thus, the court will not accept Seetharaman's assertion for purposes of this motion.

An employer may not lawfully Discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individualts race, color, religion, sex, or national origin. n 42 USC 5 2000e2(a)(1). Title VII also makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 USC § 2000e-3(a). In this case, Seetharaman claims that ComEd discharged him because of his national origin (Indian), religion (Hindu), color (dark), and in retaliation for voicing opposition to unlawful discrimination. 14

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14 In the complaint, Seetharaman also alleges that he was otherwise discriminated against during his employment at ComEd in that he was subjected to verbal harassment, denied training, given poor performance evaluations, and denied a promotion. ComEd argues that the only employment decisions truly at issue are the discharge and retaliation claims, not the other alleged forms of discrimination. See ComEd's Reply Memorandum at 1 n 1. The court agrees. In its motion for summary judgment, ComEd requests that the court enter summary judgment in ComEd's favor and dismiss with prejudice Plaintiff's complaint in its entirety." ComEd Memorandum at 15. In support of this motion, ComEd argues that there is no evidence that Seetharaman was discharged for discriminatory reasons or that he was retaliated against for opposing discrimination. In his response,

Seetharaman briefly mentions that he was discriminatorily denied training and promotional opportunities. Plaintiff's Response at 1. Yet he never identifies any opportunities for training or promotions that were denied to him. Indeed, the entire focus of his response is on his claim of discriminatory discharge and retaliation for opposing discrimination. His entire discussion of the alleged discriminatory remarks is made in the context of whether they are evidence of a discriminatory discharge. See, e.g., Plaintiff's Response Memorandum at 2 & 4. He never argues that summary judgment should be denied because ComEd addresses only the discharge and retaliation issues and fails to address the other issues mentioned in the complaint. He has not sought leave to file a surreply brief addressing ComEdts contention that the discharge is the only employment decision at issue here. The court is not bound to scour the record for issues that the parties' attorneys do not see fit to raise. Nor is it the court's task to develop arguments that might apply to issues not raised by the parties. Accordingly, Seetharaman has waived reliance on those grounds as bases for opposing summary judgment.

A. Discharge

In order to avoid summary judgment on his claim that he was discharged on the basis of his national origin, religion, and color, Seetharaman must identify sufficient evidence from which a reasonable trier of fact could conclude that he was discharged on such grounds. Seetharaman can attempt to do this through direct evidence that those factors motivated the decision to discharge him; alternatively, he can proceed under the indirect, burdenshifting method of proof as provided in McDonnell Doualas Corp. v Green, 411 US 792, 802-04 (1973). Direct evidence in this context would consist of, for example, an explicit policy of affording differential treatment to employees based on, for example, national origin or discriminatory statements uttered by the employervs decision-maker, see Giacoletto v AMAX zinc Co., 954 F2d 424, 425-26 (7th Cir 1992). Seetharaman maintains that Kovar, Hak Soo Kim, and an unidentified "instructor" made such discriminatory remarks to him. Seetharaman's Response Memorandum at 2. None of these statement suffices to prove discrimination. First,

only the statements of decisionmakers, or those who participated in the termination decision, are relevant. See Price Waterhouse v Hopkins, 490 US 228, 251 (1989) (plurality); id. at 277 (O'Connor, J., concurring); McCarthy v Kemper Life Ins. Cos., 924 F2d 683, 686-87 (7th Cir 1991). It is undisputed that Rieck reviewed the PPR ratings of the 80 plus people in the Nuclear Fuel Services Department; that based on Seetharaman's low PPR ratings and other feedback concerning Seetharaman's performance, Rieck identified Seetharaman as the poorest performer in the Department; that because Seetharaman was the poorest performer in the Department, he directed Kovar to prepare a "Separation Justification Form; that Rieck forwarded the completed form to Dennis Farrar, ComEd's General Manager of Nuclear Services, for the review of Farrar as well as a special review committee; that both Farrar and the special review committee approved Seetharaman's termination; and that Rieck terminated Seetharaman on August 27, 1992. Thus, clearly, only Rieck, Farrar, and those on the special review committee could even be considered the decisionmakers here. Certainly, neither Hak Soo Kim nor the unidentified instructor could be considered a decisionmaker. With respect to Kovar, though he had input into the decision to terminate Seetharaman, it is implausible to suggest that he harbored a discriminatory animus given the fact that he recommended that ComEd hire Seetharaman in the first place. See Proud v Stone, 945 F2d 796, 798 (4th Cir 1991). Moreover, Rovarts alleged discriminatory statements were supposedly made in 1990, approximately two and one-half years prior to Seetharaman's termination. A discriminatory remark made a significant length of time prior to the plaintiff's termination is insufficient to support a conclusion that discrimination was the reason for the termination. See Rush v McDonald's Corp., 966 P2d 1104, 1116 (7th Cir 1992); McCarthy, 924 F2d at 687. Accordingly, the court concludes that Seetharaman has failed to provide any direct evidence that he was terminated due to unlawful discrimination.

Even absent direct evidence of discrimination,

Seetharaman may prove discrimination under the indirect method as outlined in McDonnell Doualas. Under the indirect method, a plaintiff must first establish a prima facie case of a discriminatory discharge. If he manages to do so, this establishes a rebuttable presumption that his discharge was discriminatory. At this point, the defendant may then articulate a legitimate, nondiscriminatory reason for the discharge. If the defendant does this, the presumption is erased. The burden then fall back on the plaintiff to establish that the employer's suggested reason for discharging the plaintiff is pretextual. See McDonnell Douglas, 411 US at 802-04; Hong v Children's Memorial Hosp., 993 F2d 1257, 1261 (7th Cir 1993), cert. denied, 114 S Ct 1372 (1994).

To establish a prima facie case, a plaintiff must show that: (1) the plaintiff is a member of a protected class, (2) the plaintiff was performing his job well enough to meet his employer's legitimate expectations, (3) the plaintiff suffered an adverse employment decision, and (4) others not in the protected class were treated more favorably. Kizer v Children's Learning Center, 962 F2d 608, 611-12 (7th Cir 1992). In this case, ComEd maintains that Seetharaman has failed to establish elements (2) and (4).

With regard to whether Seetharaman was performing his job well enough to meet ComEd's legitimate expectations, the court agrees with ComEd that there is no genuine issue on this point. A brief rundown of Seetharamants performance deficiencies is revealing. In 1990, although Seetharaman received an overall rating of "FME" for that year, Seetharaman himself recognized that his rating was a marginal FME rating" and that his 1990 PPR assessment depicted him "as a person with a performance problem." Specifically, his work on the nuclear fuel pin analyses was rated "NI" (unsatisfactory), requiring unusual attention from his supervisors and thus detracting from the time they had available to work on their own assignments. In addition, Seetharaman was only one of two members of the Safety Analysis Group to receive an "NI" rating on any project that year.

In 1991, Seetharaman's performance went downhill. He was assigned three projects, but he received a rating of "NI" on each of them. His overall rating for that year was "NI." In 1992, Seetharaman received a rating of "S" (which was equivalent to a "NI" rating) on two of his three projects. As of May, 1992, Seetharaman's job performance continued to be considerably worse than that of every other member of the Safety Analysis Group.

Based on the above litany of performance problems, the court concludes that Seetharaman has failed to establish the second element of his prima facie case. No reasonable jury could conclude from the undisputed evidence that Seetharaman was performing his job up to ComEd's legitimate expectations

In addition, Seetharaman has failed to establish the fourth element of his prima facie case, namely, that ComEd treated similarly situated employees not in the protected class more favorably. Seetharaman points to the fact that ComEd retained Craig Holmes, a white Christian whose national origin is the United States. Yet Seetharaman fails to point to any evidence that Holmes was having any performance problems. See Plaintiff's Response at 3. Moreover, there were a number of engineers in the Safety Analysis Group with national origins other than the United States, and who were not terminated. Therefore, Seetharaman cannot establish the fourth element of his prima facie case.

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15 Seetharaman states in his affidavit, which was filed only after he filed his response to ComEd's motion for summary judgment, that Rieck told him during a meeting concerning the layoffs that performance reviews would not be used as a criteria for layoffs. This statement cannot serve to create a genuine issue of material fact because Seetharaman's Rule 12(n) statement effectively admitted the statement in ComEdts Rule 12(m) statement that Rieck did indeed use the performance reviews in determining who to layoff. The Rule 12(n) statement failed to contain a specific reference to that part of the record containing evidence disputing the relevant portion of the Rule 12(m) statement. See supra note 1.

Having failed to establish a prima facie case that he was terminated for discriminatory reasons, it is not essential to consider whether ComEd has advanced a legitimate, nondiscriminatory reason for the firing. However, the court will briefly note that ComEd has indeed advanced such a reason. The evidence is undisputed that in 1992 ComEd was experiencing serious financial problems, and that as a result ComEd implemented a major reduction in its work force. It is also undisputed that Seetharaman was the poorest performer in the Safety Analysis Group since 1991 and that his job duties could be handled by others in the Group or by outside vendors. Seetharaman has failed to demonstrate that ComEd's stated reason was a pretext to hide unlawful discrimination. Based on all of the above considerations, ComEd is entitled to summary judgment on Seetharaman's claim that he was discharged in violation of Title VII.

B. Retaliation

In his complaint, Seetharaman claims that he was discharged in retaliation for expressing his opposition to discrimination on the job. According to Seetharaman, he attended a forum held by the General Manager of the Nuclear Services Division, the purpose of which was to allow employees to air their concerns to ComEd's higher management. He alleges that he took the opportunity to complain about harassment to which he was being subjected. To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in statutorily protected expression, (2) he suffered an adverse action by the employer, and (3) there is a causal link between the protected expression and the adverse action. Dey v Colt Construction & Development Co., 28 F3d 1446, 1457 (7th Cir 1994). ComEd argues that Seetharaman has failed to establish elements (1) and (3).

With respect to the first element, ComEd argues that Seetharaman has failed to present evidence that the decision-makers were present at the forum where he supposedly com-

plained about discrimination. Seetharaman counters that they received copies of the transcript of the forum and thus were aware of all the statements made during the forum. However, Seetharaman fails to identify where in the transcript any complaint appears. The court's own review of the transcript reveals no complaint about discriminations

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16 The only reference to discrimination was in the following question: "Is there a policy within Commonwealth Edison that doesn't permit information that is needed to perform certain jobs to certain individuals based on race, color etc?22 See ComEd's Reply Memorandum Exh F at 21. Even if this question could be construed as a complaint, the transcript fails to reveal the identity of the speaker. Thus, the transcript could not have alerted the decisionmakers that Seetharaman complained of discrimination. As ComEd points out, the only question where Seetharaman is identified as the questioner has nothing to do with discrimination. See id. at 22.

Seetharaman also argues that he complained of discrimination in his rebuttals to his performance reviews. Seetharaman's rebuttal to the 1991 PPR contains comments that could conceivably be construed as complaining about discriminatory behavior he had experienced. Even though Seetharaman's comments suggest that ComEd resolved the matter favorably to Seetharaman,17 the court will assume that Seetharaman's comments constituted a complaint of discrimination. Accordingly, the court concludes that Seetharaman has satisfied the first element of a prima facie case of retaliation in that he has sufficiently demonstrated that he engaged in statutorily protected expression.

The next issue is whether Seetharaman has established a causal link between his complaint about discrimination and his termination. The court notes that the complaint was effectively contemporaneous with Seetharaman's discharge, given that Rieck reviewed all of Seetharaman's PPRs (and thus presumably the attached rebuttals) when deciding who to terminate. Thus, one could reasonably infer that the decision to terminate Seetharaman was the result of his complaint of dis-

crimination. See Dey, 28 F3d at 1458 (Generally, a plaintiff may establish [a causal] link through evidence that the discharge took place on the heels of protected activity.").

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17 Seetharaman wrote:

Several weeks ago, a CMD individual exhibited a boorish tantrum, during a work situation. Dan Lee and myself were appalled and chagrined since it created an intimidating and hostile work environment. The matter was brought to your attention. You were kind to me and efficient in warning the individual and ending the intimidating and hostile environment.
ComEd's Appendix Exh F (1991 PPR).

Once the plaintiff establishes a prima facie case, the defendant must come forward with a legitimate, nondiscriminatory reason for the discharge. Id. at 1457. Once again, ComEd argues that it discharged Seetharaman because he exhibited poor performance and because ComEd eliminated his principal job task (i.e., nuclear fuel pin analysis). Seetharaman attempts to demonstrate that ComEd's stated reason for terminating him is pretextual. He argues that it is pretextual because (l) contrary to ComEd's assertions, it is more efficient to have an employee perform the fuel pin analyses than the vendor, (2) Rieck told Seetharaman that performance ratings would not be considered in deciding who would be eliminated, and (3) another employee, Craig Holmes, was not discharged even though he could not have assumed a significant role in the organization within the short time that he was at ComEd prior to the reduction in force. See Plaintiff's Response Memorandum at 3 & 4.

With regard to Seetharaman's first two arguments that ComEd's reason for terminating him were pretextual, the court cannot accept these factual assertions because they are contrary to the facts deemed to have been admitted by Seetharaman's failure to sufficiently respond to ComEdts Local Rule 12(m) statement of material facts. See supra notes

10 & 15. As for his third argument, Seetharaman fails to establish that Holmes was similarly situated, i.e., that he had any performance problems on a par with Seetharaman. How ComEd treated Holmes is of-no relevance to Seetharaman's claim. Consequently, Seetharaman has failed to demonstrate that ComEd's reasons for terminating him were pretextual. Therefore, ComEd is entitled to summary judgment on Seetharaman's retaliatory discharge claim.

ORDERED: Defendant Commonwealth Edison Company's motion for summary judgment is granted.

ENTER:

s/ George W. Lindberg
United States District Judge

Dated: Jul 27, 1995